***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-1132

B/S

PLAINTIFF

*To be argued by*
EDWARD PANZER

In The

## United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Respondent,*

-against-

JAMES PANEBIANCO,

*Defendant-Appellant.*

# BRIEF FOR DEFENDANT-APPELLANT

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FOR THE SECOND CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Respondent,<br><br>-against-<br><br>JAMES PANEBIANCO,<br><br>Defendant-Appellant. | Docket No.: 76/1132 |

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered March 24, 1976 in the United States District Court for the Southern District of New York (Bonsal, J.) convicting Appellant Panebianco after trial of conspiring to distribute Schedule I and II narcotic drugs in violation of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21, U.S.C. (Count I). Appellant was additionally convicted of unlawfully receiving and concealing narcotic drugs in violation of Title 21 U.S.C., Sections 173 and 174 (Count 10) and distributing said narcotic drugs in violation of Title 21 U.S.C. Sections 812, 841(b)(1)(A) (Count 12). Appellant was sentenced on Counts 1 and 12 to a term of ten years imprisonment to be followed by special parole for a period of six years. On Count 10, he was sentenced to a ten year term of imprisonment with a direction that all sentences should run concurrently.

## QUESTIONS PRESENTED

1. Whether, as a matter of law, multiple conspiracies were established by the Government, as opposed to the single conspiracy charged in the indictment, and whether since this variance between the indictment and proof affected Appellant's due process right to a fair trial, his conspiracy conviction should be dismissed and a new trial ordered on the substantive counts.

2. Whether Appellant was deprived of his constitutional rights under the Fifth and Sixth Amendments to a fair trial by an impartial jury, since some of the jurors had overtly expressed their hostility to the Defendants' case.

3. Whether, in the absence of a hearing, the trial court improperly sentenced Appellant as a second felony offender.

## STATEMENT OF FACTS

Appellant Panebianco was charged in an indictment along with twelve other defendants and eleven co-conspirators with conspiring to violate the narcotic laws from January 1, 1968 up to and including June of 1973. This indictment additionally charged various defendants with 21 substantive counts of narcotic law violations. Specifically, Count 10

of the indictment charged Appellant Panebian[illegible] with receiving one half kilo of heroin in February or March of 1971 and Count 12 charged him with distributing one half kilo of heroin during the summer of 1971.

The trial on these charges commenced on January 21, 1976 before the Hon. Dudley Bonsal.

In August of 1968, Mary Mobley, who was then only 16 years of age, met Alvin Clark in Pittsburgh.* When Clark invited her to travel with him to New York the next day, she promptly accepted his invitation. Before boarding the plane to New York, Clark first gave her some money. They remained in New York for the day, and on that same evening, returned to Pittsburgh. At the New York Airport, Clark gave Mobley some money, together with a package which he told her to put in her purse (37).** She opened this package in the bathroom on the plane, and since she was both an addict and user of drugs, she was able to recognize that the package contained one eighth kilo of heroin. She then removed an ounce of heroin from the package and later returned the package to Clark in Pittsburgh (38-39).

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*At the time of the trial, Mobley was 24 years of age and had acquired convictions for possession of heroin and marijuana, burglary, and disturbing the peace. She was presently free on bond on a forgery charge, due to the assistance of the United States Attorney for New York (29-33).

**Numerical references are to the pages of the trial transcript.

Two weeks later, Mobley and Clark again flew to New York and landed at LaGuardia Airport. There an older man gave Clark a package in exchange for some money. Although she also removed some heroin from this package, she told Clark what she had done.

In September of 1968 at the Holiday Inn in Pittsburgh, Clark introduced her to "Big Lou" (Defendant Iarossi) who was the man she had seen at LaGuardia Airport only three weeks before. Clark informed her that "Big Lou" would be the one to give her the packages. Accordingly, Mobley went alone to New York two months later and received a package containing one half kilo of heroin from "Big Lou." Although Clark had instructed her to give all the money to Lou, she only gave him half and kept the other half for herself. She told Lou that Alvin would send the balance later (54-55)

In was in the wintertime of 1968 that "Big Lou" introduced her to "Ralphie" (Manfredonia) and instructed her that "Ralphie" would give her the packages if he wasn't there. Thus, from the end of 1968 to the middle of January of 1970, she picked up the packages of narcotics from Ralphie." (61).

During the summer of 1970, Clark introduced Mobley to "Gu-Gu" (Defendant Graziano Rizzo) and instructed her that he would be the one that she would now be meeting in New York (64-65). Two weeks later, she also met "Lennie" (Defendant Leonard Rizzo) (64-65). From this point until August of 1971,

she received packages from both Graziano and Leonard Rizzo, and on one occasion during this period, she received a package from the Defendant Croce, who was introduced to her through the Rizzo brothers (35, 190).

Mobley received her last package in August of 1971 (182-183). A few days before her scheduled arrival in New York, she asked Clark to get her a package from Graziano Rizzo (185-186). Clark set it up and gave her $3000 to take to New York. However, she gave Graziano Rizzo only a few hundred dollars of this money, and kept the balance for herself (185). When she returned to Pittsburgh, Clark attempted to get in touch with her, but she had decided to keep the package for herself. She finally decided to talk to Clark, and told him that she had to get rid of the package. He in turn said that Graziano Rizzo wanted to talk to her on the telephone (187). The Rizzo brothers then threatened to kill her if she did not return the package. Because she did not want Clark to tell the Rizzo brothers where she could be found, she set him up to be arrested. The charges against him were thereafter dropped (189-190).

ANTHONY MANFREDONIA, who the Government claimed was the central figure in the conspiracy, sold heroin in 1966 with Vito Panvarino. This heroin was obtained from Sal Lania. His customer at this time was the Defendant Blanchard ("Jap"). In this same year, he terminated his association

with Panvarino and began to sell heroin with the Defendant Blanchard. This heroin he obtained from Freddy Papa in Queens (383).*

It was in 1967 that Manfredonia met Defendant Iarossi ("Big Lou"). Manfredonia told him that he had a customer from Baltimore and additionally told him what he had been paying for the goods. Defendant Iarossi said that he could get the goods cheaper (387). Manfredonia then bought one half kilo of heroin from Defendant Iarossi, which he sold to Defendant Blanchard (388). From that point, Manfredonia became formally associated with Defendant Iarosso, who took him to the Astoria Colts Club in Queens, where he met Vincent Papa (391). The two men informed Papa that they needed heroin and made the appropriate arrangements for its delivery. After receiving the heroin, they sold it to Defendant Blanchard in either New York or Baltimore (396).

During 1967 through 1968, one Anthony Passero would delivery the heroin to Manfredonia at a diner in Astoria. Manfredonia's customers at this time were Defendant Blanchard, Clark, Mobley, and someone named "Socks." (401) In 1967, Manfredonia and Defendant Iarossi arranged to have Anthony Simonetti deliver the heroin to Defendant Blanchard in Baltimore (4020404). After his return, Simonetti would give Manfredonia the money for the heroin. He would then pay Papa for the heroin and split the profit with Iarisso (407-408).

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*This testimony was objected to as being outside the scope of the conspiracy, but the court admitted it as background material (381, 386).

Manfredonia also knew Appellant Panebianco, whom he first met in 1968 or 1969 with Defendant Iarossi (410). In 1969, Appellant Panebianco came to Defendant Iarossi's basement and asked them to test a sample of heroin for him. Manfredonia told Appellant Panebianco that they were having difficulty getting goods. Appellant Panebianco in turn responded that they would be able to get one half kilo of heroin from him (411-412). When Appellant Panebianco was ready to deliver this heroin, Manfredonia informed him that they no longer needed it, as Defendant Blanchard's friends had already obtained the heroin (415).

In 1968, Defendant Iarossi introduced Manfredonia as "Ralphie" to Clark (42 ). Vincent Papa wanted Virgil Alessi to deliver the heroin to Pittsburgh to these customers, but in January of 196 , when Alessi was supposed to take one half kilo of heroin to Clark in Pittsburgh, he never showed up (425).

It was in January of 1969 that Manfredonia broke his leg and was in the hospital for a month and a half. After he left the hospital he and Defendant Iarossi brought Defendant Blanchard one half kilo of heroin in Baltimore (428). This was in February or March of 1970, and it was at this juncture that he stopped dealing (433).

Manfredonia did not recommence his narcotic activities until September or October of 1970 when a friend

introduced him to Joe Barone. Barone told him that he got his heroin from Alessi, Passero, and Papa, and that his customer was G.T. Watson (433). From 1970 to February or April of 1971, the two men sold narcotics to Watson, Clark, Defendant Brooks and Defendant Blanchard (437-443). Thomas Murray would deliver the heroin for them to Clark in Pittsburgh (454).

During 1971, Manfredonia's other sources of heroin were Appellant Panebianco, Defendant Graziano Rizzi and Louis Inglese (454). He met Appellant Panebianco again in February or March of 1971 when he went to his home in the Bronx to ask for one quarter kilo of heroin. He received the heroin and sold it to Watson and Clark. In July of 1971, Manfredonia was supposed to get one half kilo of heroin from Passero and the Amato brothers, but the Amato brothers got arrested. Manfredonia again went to Appellant Panebianco's house, and got one half kilo of heroin, which he sold to Clark (455, 459). Manfredonia claimed that he had received heroin from Appellant Panebianco on about six occasions (650).

In the fall of 1971, Manfredonia met Defendant Anatala ("Bock"). Defendant Anatala told him that he was trying to do business with Huff and asked Manfredonia to get him some goods. Thereafter, on six to eight occasions, both Defendant Anatala and Manfredonia delivered narcotics to Huff. Manfredonia would give the heroin to Defendant Anatala, who in turn would take it to Huff and return with the money. Manfredonia would then pay for the heroin and

split the profit with Defendant Anatala and Barone (464-465). At this time, Manfredonia received the narcotics from Queens on only one occasion, and the other times he received the narcotics from Louis Inglese (463).

Manfredonia was also acquainted with Defendant Leonard Rizzo. In the early part of 1971, he had gone to the Graziano house in the Bronx, and it was then that he met Leonard, who represented that he could get one quarter kilo of heroin (467). A few hours later, the deal was consummated when Manfredonia gave Leonard $5000 in exchange for the one quarter kilo of heroin (468).

In 1972, Manfredonia dealt in heroin on only three occasions. In April, he gave Clark one quarter kilo of heroin and later discovered that Clark had been arrested at the airport with it. Thereafter, in July or August, Defendant Blanchard received one quarter kilo of heroin and additionally received another one half kilo two weeks later. Because Blanchard complained that he was not satisfied with the goods, Manfredonia did not deal with him again (473).

THOMAS MURRAY first met Joseph Barone when he was driving a taxi for Barone's brother in New Rochelle. He started delivering packages to several different people, one of whom was G.T. Watson (677-682). Murray met Manfredonia at Barone's house in the beginning of 1970. He would thereafter fly to Pittsburgh and deliver packages to All Pitts.

During this time, he also delivered packages to Defendant Brooks and Watson (687-88, 696-698).

It was in 1972 that Murray met Graziano Rizzo at Manfredonia's house. Defendant Anatala was also there and he had known Anatala previously from a card game (700). Graziano Rizzo took out a package and Barone gave Manfredonia money which was handed to Rizzo. An argument then ensued because Rizzo claimed that he needed $500 more (702).

Murray later met Defendant Anatala's customer, Huff, in 1974. Defendant Anatala had asked Huff if he was ready to do business and Huff responded that he was ready. Anatala gave some money to Barone who thereafter gave Murray a package to deliver to Huff (712).

DETECTIVE RALPH NIEVES was functioning as an undercover agent in the northeast Bronx in the latter part of 1972 and early part of 1973 with regard to the Police Department's investigation of one Collin Carroll. During this interval, he made several purchases of heroin from Carroll, and later came to know that Nevado was Carroll's source of heroin supply (847).

On February 6, 1973, Detective Nieves met Carroll, and followed him to a service station. There he observed Defendant Croce engaging in conversation with Nevado and Graziano Rizzo. The officer gave Carroll $2000, but Carroll stated that Nevado did not want to do any more business because the Feds were around (851). At this point, Defendants Croce and Rizzo were placed under arrest (852).

DETECTIVE ARTHUR DRUCKER, who was also involved in the Carroll and Nevado investigation, had placed Nevado's house under surveillance. On different dates, he observed Defendants Croce and Rizzo bring a manila envelope into Nevado's house (870-71). After Nevado was arrested, he was returned to his apartment in order that the officers could search it. Defendants Croce and Rizzo were also brought into the apartment and questioned. They maintained that they were looking for girls and were clean. The officers found a manila envelope under the passenger seat of Rizzo's car (874-75).

SERGEANT ARTHUR CARTER in turn had been involved in the investigation of Manfredonia in 1972 (1018). On March 7, 1972, his informant, G.T. Watson, took him to Webster Avenue in the Bronx, where he observed Watson in conversation with Joseph Barone (1019). On another occasion, he observed Watson talking to Barone and Murray. The Agent was then introduced to Murray, who told him that when the heat was off, they could deal (1020, 1022-23).

On both March 25th and April 12th of 1972, after Watson had had a discussion with Barone, the Agent would later find a brown bag containing heroin in his car, which had been parked earlier at a designated location (1025, 1036-37).

In the later part of April, Watson was observed in conversation with Fiore Rizzo, the uncle of Defendants

Graziano and Leonard Rizzo (1046-48). And on April 26th, the Agent gave Watson $9000 and later that evening, Fiore Rizzo handed Watson a package (1049).

Subsequently, on November 21, 1972, Watson had a conversation with Barone. At this time, Defendant Anatala was in the car in the driver's seat (1056). Four days later, the Agent followed Watson to Zerega Avenue in the Bronx where he saw Defendant Anatala standing by a station wagon. After Watson had a conversation with him, the mean went to a house at which Defendant Anatala kept pointing to the garage (1061). The Agent then went into the garage and removed a brown bag from a shelf which contained heroin (1061).

CONDUCT OF THE JURY

During the cross examination of Agent Carter by Defendant Anatala's attorney (Mr. Solomon), Appellant Panebianco's attorney informed the court that he heard juror number ten say "Why doesn't he stop wasting my time with these questions." According to counsel, she seemed very annoyed and then turned to juror number nine and spoke to her. However, counsel did not hear what she had said. Counsel further stated that his client had informed him that juror number three said of Defendant Anatala's attorney, "He's got some nerve asking these questions." (1040) Additionally, appellant's counsel pointed out that after his own cross

examination, juror number ten became annoyed as he walked away and said, "Well, he's already answered that question." (1040) Accordingly, counsel requested that at the very least the court voir dire the jurors involved to see if they had been discussing the case with any other jurors and to discover if they have already formed opinions without hearing the whole case (1140). Defendant Anatala's attorney also joined in this request. The court, however, responded:

> I am not going to do it on the basis of what you gentlemen have reported to me. I remember the "Micky" incident. I just think people are human beings and the panels are made up of human beings. I don't know how you can entirely say that a person has got to stop being a human being and be some kind -- I don't know what he becomes. I think jurors are that way. I have been watching the jury and I have been quite impressed. Some juror might have said something to somebody else. Jurors have feelings, and I think this interviewing of jurors on an issue like this can have effects that are probably worse than what you are worrying about.
>
> I think they have forgotten about it now. It is in the nature of things. It happened yesterday afternoon. It was getting a little late. This jury has been wonderful about getting her, I think much more so than the lawyers (1141-42).

Anatala's counsel pointed out that the court had admonished the jury at the inception of the case, but they paid no attention. Mr. Lavin then stated that he did think that one of the jurors had expressed annoyance outloud (1142).

## ARGUMENT

### POINT I

AS A MATTER OF LAW, MULTIPLE CONSPIRACIES WERE ESTABLISHED BY THE GOVERNMENT, AS OPPOSED TO THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT. SINCE THIS VARIANCE BETWEEN THE INDICTMENT AND PROOF AFFECTED APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL, HIS CONSPIRACY CONVICTION MUST BE DISMISSED AND A NEW TRIAL ORDERED ON THE SUBSTANTIVE COUNTS.

The court charged in effect that if the jury found that a multiple instead of a single conspiracy was established by the Government, Appellant Panebianco must be acquitted of said conspiracy. It is our position on this appeal that while generally the question of whether a multiple conspiracy exists is a factual question for the jury to determine, this case presents a situation where as a matter of law there was without a doubt multiple conspiracies proven by the Government.

In contrast to the usual narcotic conspiracy case where separate groups of importers, wholesales, middlemen and retailers are chained together in one co-operative venture, each contributing to the success of the whole (e.g., United States v. Borelli, 336 F.2d 376 (2d Cir., 1964); United States v. Aviles, 274 F.2d 179 (2d Cir., 1959), cert. den. 362 U.S. 974 (1960); United States v. Agueci, 310 F.2d 817 (2d Cir., 1962), cert. den. 372 U.S. 959 (1963); United States v. Cirillo, 416 F.2d 1233 (2d Cir., 1972)), the

evidence in this case clearly establishes at the very least three independent conspiracies - each with its own source of supply, its own customers, its own core conspirators, and its own base of operations. The activities of one had nothing to do with the activities of the other. Each pursued their own interests without the slightest concern or contribution to the success of the others. In such circumstances, multiple conspiracies were in fact established under this Court's recent decision of United States v. Bertolotti, 529 F.2d. 149 (2d cir. 1975).

Taking the view of the evidence most favorable to the Government, the proof adduced at trial established at least three separate groups of narcotics dealers.

Commencing the end of March 1967 through 1970, the alleged conspiracy revolved around the partnership of Manfredonia and Iarossi. Their source of supply during this time was primarily Vincent Papa in Queens. Appellant was an infrequent alternate source and no relationship existed between him and Papa. Because of the absence of any such relationship, it can be fairly assumed that Papa and Appellant were in fact competitors, and not eager to further the other's ventures. The principal customers of Manfredonia and Iarossi during this interval were Blanchard, Clark, Mobley and "Socks."

After March of 1970, Manfredonia admitted outright that he stopped dealing in narcotics (433). As this conspiracy terminated, Manfredonia's association with Iarossi likewise terminated.

The second conspiracy did not commence until seven or eight months later, when Manfredonia formed a new association with Joseph Barone. Their prime source of heroin was the Queens group, consisting of Alessi, Passero, and Papa. In 1971, the two partners also received some heroin from the Rizzo brothers, and Appellant Panebianco. However, in 1971, their primary source of supply was Louis Inglese. Their principal customers were Watson, Clark, Brooks, Blanchard, and Anatala.

In 1972, Manfredonia dealt in heroin on only three occasions - once with Clark and his final two narcotic transactions were with the Defendant Blanchard.

Despite the fact that there was an overlapping of some of the parties in the first and second conspiracy, the evidence adduced by the Government points to entirely separate conspiracies. While this Court has been confronted with many cases where the demarcation between the conspiracies is indeed vague, fortunately, that is not the case here. Manfredonia's own admission that he quit dealing in narcotics for a seven or eight month period is the clinching factor that unequivocally demonstrates that the first conspiracy had terminated. The Government at trial claimed that Manfredonia was the key figure in their alleged single conspiracy. Certainly, once he quite said conspiracy, the conspiracy came to an end, and did not revive when Manfredonia

formed his new association some seven or eight months later. Given this critical time gap, the Government's theory of a continual conspiracy is surely doomed.

However, even assuming that this Court may entertain some doubts regarding the divisibility of the first and second conspiracy, it is submitted that there can be no doubt concerning the existence of the third conspiracy.

During 1972 through 1973, a period when even Manfredonia was out of business, the Government proved another distinct conspiracy evolving around Collin Carroll and Nevado, who was Carroll's source of supply These men engaged in a totally separate enterprise and were not in any way associated with the activities of the Manfredonia group. The only link, which is at best tenuous, is the Government's proof that Graziano Rizzo and Croce were Nevado's source of supply. Obviously, Rizzo and Croce were essentially free agents, who dealt peripherally with one or the other of two groups. Other than the undercover detective's buy from Carroll, no other customers for this group were shown.

The aforementioned facts thus show the existence of three independent groups with different core conspirators and different distributional networks. Each pursued their own interest and did not co-operate with the other for their mutual benefit. It cannot even be said that the activities

of each conspiracy paralleled and competed with the other, since each conspiracy was instituted at different and separate time intervals.

Further, it was not established by the Government that the various groups had a common source of supply for their various needs. Although the Rizzo brothers evidently supplied the latter two groups with heroin, this does not mean that the various groups had any interest in contributing to the success of the ventures of another group. The fact alone that the various groups were in the same business is a wholly insufficient basis for claiming a single conspiracy Kotteakos v. United States, 328 U.S. 750 (1945).*

Finally, it is important to note that the Government failed to demonstrate any cohesive or organized plan among the co-conspirators. What the Government did show were many isolated transactions occurring at different times. They did not prove that "continual involvement with each other" that "provided the common thread upon which the jury properly could find the single conspiracy charged." United States v. Calabro, 449 F.2d 890, 893 (2d Cir. 1973). There should be some nexus among the different parties to justify a finding of a single conspiracy and such nexus did not exist in this case.

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*There is no indication in this record that Manfredonia dealt with Graziano Rizzo during the existence of the first conspiracy (1967-1970). The only evidence of Rizzo's involvement in drugs is Mobley's testimony that she was supplied with heroin by him in the summer of 1970. During this particular period, Manfredonia was retired.

Recently, in United States v. Bertolotti, supra, this Court found that the Government was guilty of merging several conspiracies in one indictment for the sake of convenience. In order to establish a single conspiracy, the Court stated that one of the following three criteria should be satisfied: First, the existence of a mutual dependency and assistance among the various groups should be shown. United States v. Traumenti, 513 F.2d 1087 (2d Cir., 1975). To reach such a conclusion in Traumenti, supra, this Court relied on the fact that one man worked for both groups and could easily move from one group to another and further, that the groups interacted, each aware of the details of the other's operations. As opposed to Traumenti, there was no such common link among the three conspiracies proved by the Government. At best, Rizzo and Croce only served as a remote link between the second and third group. They played no part in the first conspiracy. Second, according to Bertolotti, it is incumbent upon the Government to establish a common aim or purpose among the participants As demonstrated, the various groups were out only to further their own individual enterprises and had no interest whatever in furthering the interest of any other group. And third, this Court in Bertolotti further held that a single conspiracy could be found if a permissible inference from the nature and the scope of the operation could be drawn that each

participant was aware of his part in a larger organization wherein others performed similar roles equally important to the success of the venture. This factor is likewise conspicuously absent from the Government's case. The evidence adduced at trial did not establish co-existing and parallel groups that form the typical ongoing chain conspiracy. The Government only established that there were different groups conducting their narcotic activities at distinctly separate time periods.

Considering all these factors, it is submitted that the Government has failed to establish the existence of the single conspiracy which was charged in the indictment and it is further submitted that such a variance between the indictment and the proof adversely affected appellant's due process right to a fair trial.

In Bertolotti, supra, this Court also discussed what factors would affect a defendant's substantial rights sufficient to make the variance material and require reversal. The Court stated that the "possibility of prejudice resulting from a variance increases with the number of defendants tried and the numb r of conspiracies proved." In this case, Appellant Panebianco was charged in an indictment along with 12 other defendants and 11 co-conspirators, and the proof established at least three separate conspiracies. Such numbers in and of themselves raise a clear inference of prejudice. Appellant, by virtue of the large number of defendants and co-conspirators, was subjected to

voluminous testimony concerning a myriad of criminal activities in which he played no part. Moreoever, it must be pointed out that the conspiracy charged in this particular indictment was not of a relatively short duration, but encompassed a period of six years. It was thus virtually impossible for appellant to defend himself against the separate transactions conduc[illegible] his co-defendants and co-conspirators. Under such circumstances, the jury simply could not give Appellant's case the individual consideration which is required in every case.

Consequently, because Appellant's due process right to a fair trial was seriously infringed by the proof of the multiple conspiracies, this Court should dismiss the conspiracy count against him and order a new trial on the substantive charges.

## POINT II

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO A FAIR TRIAL BY AN IMPARTIAL JURY SINCE SOME OF THE JURORS HAD OVERTLY EXPRESSED THEIR HOSTILITY TO THE DEFENDANTS' CASE.

In clear and uncertain terms, the trial court was informed not only of the possibility that certain jurors were discussing the case amongst themselves contrary to the court's admonition, but also that jurors number three and ten had expressed their outright annoyance with counsel's cross examination of certain witnesses. Despite counsels'

requests that the jury be voire dired to determine if they had already formed an opinion before hearing all the evidence in the case, the court flatly refused to conduct such an examination. Absent this critical voire dire examination, Appellant could not be guaranteed his constitutional rights under both the Fifth and Sixth Amendments to a fair trial by an impartial jury.

This record clearly indicates that jurors number three and ten were partial to the Government's case. Their remarks reveal that they had already made up their mind concerning appellant's culpability, and further cross examination of any of the Government's witnesses in their view would be a "waste of time." Juror number three, in speaking of Defendant Anatala's attorney, even went as far as exclaiming "He's got some nerve asking these questions." (1140) Such serious allegations of jury misconduct were not predicated solely upon the word of defense counsel, but was bolstered by the Assistant United States Attorney, who interjected that he thought one of the jurors had expressed their annoyance outloud.

The court in refusing to conduct the requested voire dire, relied on the premise that the jury was composed only of human beings who have feelings. It is precisely because of this fact that such a voire dire examination was crucial. The jurors are inexperienced as to their duties in a criminal case, and must be instructed by the court regarding how to perform their vital function. They cannot

be guided by their feelings, but must only be guided by the law as given to them by the court. By permitting the jurors to be negatively predisposed towards the defendants before the conclusion of the entire case, the court in essence thwarted the cardinal principal of every criminal trial -- that is the firm belief that a defendant is presumed innocent until proven guilty. And such a presumption accompanies him to the conclusion of the entire case.

Moreoever, the jurors, who were unfavorably impressed with Appellant's case, could very well have influenced the other jurors to support their position. This danger was expressly realized by the Eighth Circuit in Winebrenner v. United States, 147 F.2d 322 (8th Cir., 1945), when the Court stated:

> A juror having in discussion not only formed but expressed his view as to the guilt or innocence of the defendant, his inclination thereafter would be to give special attention to such testimony as to his mind strengthened, confirmed, or vindicated the views which he had already expressed to his fellow jurors, whereas, had there been no discussion and no expression of tentative opinion, he would not be confronted with embarrassment before his fellow jurors should he change the tentative opinion which he might entertain from hearing evidence. 147 F.2d at p. 328.

Additionally, it must be pointed out that the charge of conspiracy is not a simple crime, but is technical and complicated to comprehend, especially for individuals with no legal experience. Hence, it is only after the court charges

the jury on the applicable law can they intelligently consider the evidence. In this case, however, some of the jurors obviously formed their opinions without the assistance of the court's instructions, which set the appropriate standards of determining the guilt or innocence of the defendants.

Hence, the court's refusal to voir dire the jurors simply because they were human beings with feelings cannot receive judicial sanction.

An examination of other cases, albeit limited in number, clearly demonstrates that it was incumbent upon the court to take some corrective action.

In Winebrenner v. United States, supra, the Eighth Circuit condemned the trial court's refusal to admonish the jury that they should not discuss the case nor form any opinion as to the guilt or innocence of the defendant until the case had been submitted to them. Admittedly, in the present case, such an admonition was given by the court. Nevertheless, when it was brought to the court's attention that some of the jurors were disregarding its instructions and indeed had formed opinions about the case, the court should have questioned those particular jurors and should have issued stronger cautionary instructions at that time.

In United States v. Nance, 502 F.2d 615 (8th Cir., 1974), the defendant, after the verdict, alleged that the jurors had failed to obey the court's admonition not to discuss the case during pendency of the trial. The appeals

court did not give credence to such an allegation since it was submitted after the verdict. Under such circumstances, courts are reluctant to interfere with the jury's verdict. Of course, in this case, counsel promptly brought the matter of jury misconduct to the court's attention during the trial when the court clearly had the opportunity to take some corrective measure. See also United States v. Klee, 494 F.2d 394 (9th Cir., 1974).

And in Milam v. United States, 322 F.2d 104 (5th Cir. 1963), a case analagous to the factual situation presented here, the defendant claimed that his motion to set aside the verdict should be granted since one juror told two other jurors that if he were a witness in this case, he would sue the defense lawyer for all he was worth for the way he was harassing witnesses. The court denied the motion but offered to excuse the juror who made the remark and substitute an alternate juror. Although counsel insisted that he felt that the whole jury was tainted, the court made every effort to accord the defendants a fair trial by discharging the offending juror and instructing the jury. However, in this case, the court made no effort whatever to protect the defendants, although the remarks made by jurors number three and ten must be deemed equally as offensive as the juror's remarks in Milam.

Finally, it should be noted that the court's belief that the jury was always on time and had been paying attention

more than compensated for such remarks was irrelevant to the issue at hand. The issue was not their punctuality or their failure to pay attention. The sole issue was whether the negative remarks made by some of the jurors should have prompted some type of court action and we submit that it should have. In refusing to issue any corrective instructions, the court opined that any such instruction would only have exacerbated the situation. Contrary to the court's conclusion, such a tactical decision should be properly left to defense counsel, who felt that such instructions were necessary in order to protect their clients' cases.

Under the circumstances of this case, it must be found that the court's failure to take any corrective action impaired Appellant's right to a fair and impartial jury, thereby mandating that his conviction be reversed and a new trial ordered.

## POINT III

### IN THE ABSENCE OF A HEARING, THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT AS A SECOND FELONY OFFENDER.

At sentence, the Government informed the court that it had filed a second felony offender information against Appellant based on his conviction on January 3, 1973 for violating Title 18 U.S.C. Sec. 371. Counsel immediately protested and pointed out that he had requested a hearing to determine if Appellant were in fact a second felony

offender. Instead of granting the requested hearing, the court merely stated "I will talk to you about this a little further later on." (min. of 3/24/76, p. 1880). Unfortunately, no further discussion was held and the court proceeded to sentence Appellant as a second felony offender. Appellant's sentence must now be vacated, and he should be remanded for a hearing on the issue of whether he was properly sentenced as a second felony offender.

Although not set forth in definitive terms, there can be no question but that Appellant was sentenced as a second felony offender. In addition to the prison term imposed upon him, the court imposed a special parole for a period of six years following his release. Title 21 U.S.C. Sec. 841(1)(A) specifically provides "Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment."

The fact that Appellant was sentenced to a 6 year special parole firmly bolsters his contention that he was sentenced as a second felony offender. If this Court entertains any doubts on this score, it should remand the case

for clarification by the court below for an accurate determination of whether Appellant was sentenced as a second felony offender.

## POINT IV

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE OTHER APPELLANTS ARE INCORPORATED BY REFERENCE.

## CONCLUSION

IN ACCORDANCE WITH POINT I, THE CONSPIRACY COUNT SHOULD BE DISMISSED AND A NEW TRIAL ORDERED ON THE SUBSTANTIVE COUNTS; IN ACCORDANCE WITH POINT II, APPELLANT'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED; AND IN ACCORDANCE WITH POINT III, APPELLANT SHOULD BE REMANDED FOR A HEARING TO DETERMINE HIS STATUS AS A MULTIPLE OFFENDER.

RESPECTFULLY SUBMITTED,

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May, 1976

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ,
Respondent,

- against -

JAMES PANEBIANCO.,
Defendant- Appellant

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
*That on the* 9th *day of* June *19*76 *at* One St. Andrews Plaza, New York, New York

*deponent served the annexed* Brief *upon*

Robert B. Fiske Jr.

*the* Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

*Sworn to before me, this* 9th
*day of* June *19* 76

Victor Ortega
VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977